No. 08-1084

IN THE

Supreme Court of the United States

MICHAEL ANTHONY TAYLOR,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Several states are in disarray over the important question here: Does a defendant who pleads guilty to a capital crime retain the right to have a jury find the facts required to authorize a death sentence? Like a number of states, Missouri has a law by which a single waiver automatically forfeits two separate rights. Pursuant to the statute, a capital defendant who pleads guilty and waives a trial jury is deemed to simultaneously surrender the wholly distinct right to have a jury determine death eligibility. Three state supreme courts have upheld this mechanism, whereas two others consider it unconstitutional. Other states also have the provision, although their supreme courts have yet to rule on its constitutionality.

In opposing certiorari, Missouri does not even bother to argue that the statute under which Mr. Taylor was denied a jury is constitutional. It plainly is not. As this Court made clear in *Blakely v. Washington*, 542 U.S. 296 (2004), pleading guilty to a particular crime does not waive a defendant's Sixth Amendment "*right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313 (emphasis in original). When Mr. Taylor was sentenced, Missouri law required four discrete factual findings to be made before a death sentence could be imposed. The State has sought for the past 18 years to execute Mr. Taylor without ever putting to a jury any of those factual questions "essential to the punishment" of death.

Missouri insists that this is permissible because Mr. Taylor waived his right to a sentencing jury when he pleaded guilty in 1991. Conveniently, Missouri neglects to mention that it does not rec-

ognize the very right that it now claims Mr. Taylor somehow waived. Both in 1991 and today, "No defendant who pleads guilty to a homicide offense . . . shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state." Mo. Rev. Stat. § 565.006.2.

Missouri thus nonsensically asserts that Mr. Taylor waived a right that it does not acknowledge to exist and has never extended to Mr. Taylor. In Missouri, "jury sentencing after a guilty plea is not a right for the defendant to waive, rather a privilege for the State to grant. Taylor did not waive sentencing by a jury because he could only obtain jury sentencing if the State agreed to it. The State did not agree." *State v. Taylor*, 929 S.W.2d 209, 217 (Mo. 1996) (en banc). Missouri concedes, as it must, that "the State did not actually agree to jury sentencing after [Mr. Taylor's] guilty plea." (Mo. Br. 22) Thus Mr. Taylor could not have waived a right that Missouri unconstitutionally denied him in the first place.

In addition to violating Mr. Taylor's Sixth Amendment jury right, Missouri has denied Mr. Taylor due process of law by arbitrarily withholding from him the same relief granted to other capital defendants unconstitutionally deprived of a sentencing jury.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE STATES CONCERNING AUTOMATIC-WAIVER STATUTES IN CAPITAL CASES

Whether Mr. Taylor may be put to death based on the findings of "a lone employee of the State," *Blakely*, 542 U.S. at 314, is not the only important question in this case. Missouri and several other states have laws under which a capital defendant who pleads guilty and waives a trial jury is automatically deemed to forfeit the right to jury determination of facts essential to punishment.[1]

Courts addressing the constitutionality of these statutes have reached incompatible results. In Missouri, the automatic-waiver provision was upheld in this very case. *See State v. Taylor*, 929 S.W.2d 209 (Mo. 1996) (en banc).[2] Two other states have fol-

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[1] *See* Colo. Rev. Stat. § 18-1.3-1201(1)(a) (2009); Ga. Code Ann. § 17-10-32 (2009); Ind. Code § 35-50-2-9(d) (2009); Kan. Stat. Ann. § 21-4624(b) (2009); Mo. Rev. Stat. § 565.006.2 (2009); Okla. Stat. tit. 21 § 701.10 (2009); S.C. Code Ann. § 16-3-20(B) (2009); Wyo. Stat. Ann. § 6-2-102(a)(ii) (2009).

[2] Missouri incorrectly asserts that there is no "conflict between the seven-word November 25, 2008 order of the Missouri Supreme Court (App. 238a) and the decisions of other courts." (Mo. Br. 10) The November 2008 order states simply: "Appellant's motion to recall the mandate overruled." (App. 238a) The "mandate" that Mr. Taylor there sought to recall on federal constitutional grounds was the one issued in *State v. Taylor*, 929 S.W.2d 209 (Mo. 1996) (en banc). (App. 214a - 237a) Thus by denying Mr. Taylor's motion, the November 2008 order left the *Taylor* decision in full force. And *Taylor* expressly holds that "jury sentencing after a guilty plea is not a right for the defendant to waive, rather a privilege for the State to grant."

lowed suit. *See State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004) ("Appellant asserts [the unconstitutionality of a statute requiring] that the sentencing proceeding be held before the judge when a defendant pleads guilty to murder. We disagree. . . . Appellant was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing."); *Moore v. State*, 771 N.E.2d 46, 49 (Ind. 2002) ("Even if we were to assume that the defendant might otherwise be constitutionally entitled to a jury determination of the death eligibility factors, his plea of guilty forfeited any such claimed entitlement. When the defendant pleaded guilty to three counts of murder, he did so knowing that such plea would deprive him of access to a jury.").

In Colorado, on the other hand, the supreme court struck down a functionally identical statute. *See Colorado v. Montour*, 157 P.3d 489, 498 (Colo. 2007) (en banc) ("Once a capital defendant enters a guilty plea, he retains the Sixth Amendment right to jury sentencing on the facts essential to the determination of death eligibility.") (citing *Blakely*, 542 U.S. at 310). *See also State v. Page*, 709 N.W.2d 739, 763 (S.D. 2006) ("We must reject as unconstitutional any reading of [South Dakota's capital-sentencing statute] that would *prevent* a capital defendant from having the opportunity to have a sentencing hearing before a jury.") (emphasis in original). Federal law reflects this approach and guarantees the right of a capital defendant pleading guilty to have sentencing

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Taylor, 929 S.W.2d at 217. Accordingly, the law in Missouri today is that capital defendants who plead guilty have no right to jury determination of death eligibility. *See Storey v. State*, 175 S.W.3d 116, 149 (Mo. 2005) (en banc) ("Punishment is different than guilt. A 'defendant has no constitutional right to have a jury assess punishment.' ") (quoting *Taylor*).

facts found by a jury. *See* 18 U.S.C. §§ 3593(b), 3593(e), 3594 (2009).

In sum, states are in discord over whether statutes such as Missouri's are constitutional. By granting Mr. Taylor's petition and deciding the issue, this Court would resolve the confusion over this important question.

II. MISSOURI'S AUTOMATIC-WAIVER STATUTE, WHICH MISSOURI DOES NOT DEFEND, VIOLATES THE SIXTH AMENDMENT

Tellingly, Missouri does not argue that it is constitutional to deny a sentencing jury to a capital defendant based solely on a guilty plea. By all indications, it is not. As this Court has held, "a guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination." *Parke v. Raley*, 506 U.S. 20, 29 (1992) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)). Never has this Court ruled that pleading guilty automatically waives both a trial jury and a sentencing jury. On the contrary, this Court in *Blakely* invalidated the petitioner's sentence—despite his pleading guilty—because the "facts supporting [Mr. Blakely's sentence] were neither admitted by petitioner nor found by a jury." 542 U.S. at 303.

Mr. Taylor is in a position equivalent to Mr. Blakely's. The facts needed to authorize Mr. Taylor's death sentence clearly were not found by a jury, and nothing that he admitted at his plea hearing alone authorized capital punishment. The sentencing procedure that applied to Mr. Taylor required four discrete factual findings to be made before a sentence of death could be imposed. If any of the four find-

ings was not made, Mr. Taylor had to be sentenced to life imprisonment.[3] By precluding a jury from making these key factual determinations, Missouri's automatic-waiver statute denied Mr. Taylor "the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 542 U.S. at 313 (emphasis in original). Thus "[b]ecause the State's sentencing procedure did not comply with the Sixth Amendment, [Mr. Taylor's death] sentence is invalid." *Id.* at 305.

[3] Missouri's current capital-sentencing statute "only govern(s) offenses committed on or after August 28, 2001." Mo. Rev. Stat. § 565.030.7 (2009). The prior version of the statute, applicable to Mr. Taylor, reads in relevant part:

> The trier shall assess and declare the punishment of life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
>
> (2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or
>
> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

State v. Whitfield, 107 S.W.3d 253, 258 (Mo. 2003) (en banc) (quoting Mo. Rev. Stat. § 565.030.4 (1994)). "Section 565.030.4 on its face requires that steps 1, 2, 3, and 4 be determined against [a] defendant before a death sentence can be imposed." *Id.*

Rather than try to defend its unconstitutional statute, Missouri dodges the question and devotes essentially all of its brief to insisting that Mr. Taylor waived a sentencing jury when he pleaded guilty in 1991. (Mo. Br. 12-24)

The State's argument makes no sense. Both at the time of Mr. Taylor's plea and today, "No defendant who pleads guilty to a homicide offense . . . shall be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement of the state." Mo. Rev. Stat. § 565.006.2. The Supreme Court of Missouri ruled that Mr. "Taylor did not waive sentencing by a jury because he could only obtain jury sentencing if the State agreed to it. The State did not agree." *Taylor*, 929 S.W.2d at 217. The Eighth Circuit Court of Appeals agreed in Mr. Taylor's habeas proceeding that "section 565.006.2 does not grant substantive rights to a defendant. Rather, it is a provision which must be agreed upon by the prosecutor." *Taylor v. Bowersox*, 329 F.3d 963, 973 (8th Cir. 2003). Were there any doubt, Missouri confirms that "the State did not actually agree to jury sentencing after the guilty plea as was theoretically possible under § 565.006.2." (Mo. Br. 22)

It therefore is clear that Missouri never recognized a right to jury sentencing that Mr. Taylor could have waived. Even assuming that he had initially wanted to forgo a sentencing jury, Mr. Taylor clearly requested a jury after his first death sentence was vacated in 1993 following evidence that the judge had been under the influence of alcohol at the penalty hearing. (App. 1a, 97a)

Missouri also tries to distract from its unconstitutional statute by asserting that, because Mr. Taylor did not include a "*Ring* claim" in his 1995 appeal

which the Missouri Supreme Court denied in *State v. Taylor*, 929 S.W.2d 209 (Mo. 1996) (en banc), that "court's November 25, 2008 decision is grounded in principles of state law," and accordingly "there is no federal question for this court to review." (Mo. Br. 11)

First, Mr. Taylor did not raise a "*Ring* claim" in his 1995 appeal because *Ring* was then seven years from being decided. *See Ring v. Arizona*, 536 U.S. 584 (2002). More importantly, the Missouri Supreme Court clearly was cognizant of—and not persuaded by—Mr. Taylor's repeated requests for a sentencing jury: "[T]he right to a jury on the issue of punishment in a first degree murder case is created by statute. 'A defendant has no constitutional right to have a jury assess punishment.' " *Taylor*, 929 S.W.2d at 218-19 (citations omitted). Second, the November 2008 "decision" from which Mr. Taylor appeals is all of seven words long: "Appellant's motion to recall the mandate overruled." (App. 238a) There is no discernible ground of decision there at all, let alone one based on adequate and independent state law. As this Court has held, " 'ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.' " *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). Third, even assuming that it is reasonable to have expected Mr. Taylor to raise a federal jury-sentencing claim in 1995—despite the fact that no such claim existed in 1995—the prejudice of now putting Mr. Taylor to death, despite a jury never finding the facts to authorize such a sentence, is clear. To execute Mr. Taylor under such circumstances would work a grave miscarriage of justice.

Despite the Sixth Amendment, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring* and *Blakely*, Missouri still asserts—without explanation—a prerogative to strip a capital defendant who pleads guilty of the right to have a jury find the facts required to order that person's death. This refusal to apply unambiguous constitutional law warrants this Court's attention.

III. MISSOURI'S ARBITRARY DENIAL OF MR. TAYLOR'S MOTION TO RECALL THE MANDATE DEPRIVED HIM OF DUE PROCESS OF LAW

Missouri offers no principled reason why it should be entitled to put Mr. Taylor to death while it spares the lives of other equivalently situated capital defendants. As related in *State v. Whitfield*, 107 S.W.3d 253, 256 (Mo. 2003) (en banc), "Mr. Whitfield contends his right under the Sixth and Fourteenth Amendments, as set out in *Ring*, was violated because the judge rather than the jury made the factual determinations on which his eligibility for the death sentence was predicated. This Court agrees." Despite holding that the violation lay in the fact that a judge rather than a jury found the defendant death-eligible, the *Whitfield* court evidently cabined its decision to cases "in which the jury was unable to reach a verdict and the judge made the required factual determinations and imposed the death penalty." *Id.* at 268-69.

Missouri now argues that Mr. Taylor is properly excluded from *Whitfield*'s application because in *Whitfield* "a jury heard the penalty phase evidence but was unable to decide punishment. . . . In the present case, petitioner waived the right to jury sen-

tencing at his February 8, 1991 plea of guilty." (Mo. Br. 11-12) As explained above, Mr. Taylor could not have waived a right to a sentencing jury because Missouri—unconstitutionally—does not recognize the right. Moreover, it makes no material difference that Mr. Whitfield had the initial benefit of a sentencing jury which, upon deadlocking, was replaced by a judge. The point is that a jury did not find the facts "legally essential" to impose the death penalty. Because that is the principle underlying *Whitfield*, limiting the decision to cases "in which the jury was unable to reach a verdict" is an arbitrary distinction that denies Mr. Taylor due process of law.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Taylor's petition.

May 11, 2009

Respectfully submitted,

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